IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6324 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ICICI LIMITED

Versus

STATE OF GUJARAT

Appearance:
MS INDIRA JAYSINGH AND MR SB VAKIL instructed by
SINGHI & BUCH ASSO. for Petitioners MR SN SHELAT,
ADDITIONAL ADVOCATE GENERAL with
MR AD OZA, GOVERNMENT PLEADER for Respondent No. 1 MR BJ
SHELAT with MR ASHOK L SHAH for Respondent No. 2
MR MJ THAKORE, MR SN SOPARKAR and MR PC KAVINA
for Interveners.

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 08/12/2000

C.A.V. JUDGEMENT

In this petition under Article 226 of the

Constitution, three public Financial Institutions, viz. ICICI Ltd., Industrial Development Bank of India and IFCI Ltd. (hereinafter referred to as ICICI, IDBI and IFCI respectively or as "public financial institutions") have challenged the notification dated 22.10.1999 (annexure "C") issued by the State of Gujarat under the provisions of Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as "BRU Act") in favour of respondent No.2-Gujarat Telephone Cables Ltd, a public limited company. The petitioners have also prayed for a writ to restrain the State Government from issuing any fresh notification in favour of respondent No.2-Company or renewing the notification issued under BRU Act in favour of respondent No.2.

2. The petitioners are public financial institutions which had advanced loans to respondent No.2-Gujarat Telephone Cables Ltd (hereinafter referred to as "the respondent Company" or "the Company"). The petitioners had advanced loans in various categories to the respondent Company as per the statements at Annexures A and B respectively. The particulars of advances, outstandings and arrears as in April/May 2000 are as under :-

		Advances	Outstandings	Arrears on (Rupees in lacs)	Dues as
(1)	(2)	(3)	(4)	(5)	(6)
1.	ICICI	8557	5096	2979	15.04.2000
2.	IDBI	700	1206	1206	01.04.2000
3.	IFCI	111	101	101	11.05.2000
	Total	6403	4286		

3. According to the petitioners, the respondent-Company committed breach of loan agreements and failed to:

(a) furnish periodical information/reports on its financial performance, monthly cash flows and other informations requested by the petitioners

from time to time.

(b) appoint representative of petitioner No.1 as nominee Director on the Board of the Company.

(c) issue Equity Shares of the Company consequent to the notice of conversion issued by petitioner No.1.

4. Being dissatisfied with the conduct of the Company, the ICICI by their without prejudice notice dated 15.3.2000 called upon the Company to convert whole of the outstanding amount of the loan of Rs.500 lacs and part of the debenture facility to the extent of Rs.2000 lacs (amounting to Rs.222.2 lacs) into fully paid up equity shares of Rs.10 each at par as on 31.3.2000 in terms of relevant agreements. By letter dated 21.3.2000 the Company through its advocate denied the contents of the letter and informed the ICICI Ltd. that the respondent Company had been declared by the State Govt as a relief undertaking under BRU Act for a period of 12 months from 22.10.1999. The petitioners therefore through advocate sent notice dated 12.6.2000 to the State Government in the Labour & Employment department, Industries & Mines Department and Finance Department calling upon the heads of the said departments to furnish various particulars, interalia, whether the State Govt had given any loan guarantee or any other financial assistance to the respondent company, whether the respondent-Company had disclosed to the State Government the various loan agreements and commitments made by it to the petitioner institutions and also as to what was the basis on which the Government had purported to reach satisfaction under section 3 of the BRU Act. Thereafter, the petitioners filed the present petition on 3rd July 2000. During pendency of the petition, the State Government issued another notification dated 6.10.2000 extending the protection under the BRU Act in favour of the respondent Company for a further period of 12 months from 22.10.2000. The petition is heard and disposed of as containing challenge to the said renewal notification dated 6.10.2000 as well.

CONTENTIONS ON BEHALF OF PETITIONERS

5. At the hearing of this petition, the learned counsel for the petitioners have raised the following contentions:

5.1 The State Government had no authority or jurisdiction to issue notification in favour of the

respondent Company as the BRU Act applies only to industrial undertakings started, acquired or otherwise taken over by the State Government and carried on or proposed to be carried on by itself or under its authority or to which any loan, guarantee or other financial assistance has been given by the State Government. The Company does not fall in any of these categories.

5.2 The object of the Act is to make temporary provisions for industrial relations and other matters as a measure of preventing unemployment or of unemployment relief and with that object the legislature has empowered the State Govt to direct suspension of all or any of the legislations in the schedule to the Act and also to suspend or to apply after modifications of any of the settlements, etc. made under any of the laws under the Schedule to the Act and also to suspend the rights, privileges, obligations and liabilities under any such laws, agreements etc mentioned in the schedule relating to Industrial relations, such as Industrial Employment (Standing) Orders Act, 1946, Industrial Disputes Act, 1947, Bombay Industrial Relations Act, 1946, Bombay Shops and Establishments Act, 1948 etc. Thus the object of the Act is only to empower the State Government to suspend the rights and privileges of the employees and the duties, obligations and liabilities of the employer Company. Clause (iv) of Section 4(1)(a) of the BRU Act is required to be read ejusdem generis in light of preceding clauses. The Act was not intended to affect any remedy of a commercial nature incurred in the ordinary course of business, and hence, the notification is ultra vires the Act and therefore the notification deserves to be quashed and set aside.

5.3 The loans and advances made by the petitioners to the respondent-Company are recoverable under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "DRT Act"). Section 34 of the said Act gives an overriding effect to the DRT Act over all other laws except a few. The BRU Act is not one of those excepted and, therefore, the DRT Act, which is a Central Act with a overriding provision overrides the BRU Act which is a State Act.

5.4 Large amounts of public moneys have been invested in the respondent Company and the impugned notifications dated 22.10.1999 and 6.10.2000 will have the effect of defrauding the public of moneys due from the respondent Company to the petitioners - public financial institutions. If at all any Company is sick and deserves

any temporary protection against recovery, there is a special law dealing with sick industrial Companies, namely, Sick Industrial Companies (Special) Provisions Act, 1985 (hereinafter referred to as "the SICA") and any suspension of commercial liability can only take place under "SICA" and not under any other law.

5.5 The impugned notifications were issued without issuing any public notice or without giving any opportunity of hearing to the petitioners who are secured creditors and are public financial institutions. Reliance is placed on the decision dated 2.12.1999 of this Court in Goyal M.G. Gases vs. State of Gujarat, 2000(1) GLH 661 for contending that any such notification under the BRU Act issued without issuing public notice or without providing opportunity of hearing to the creditors is liable to be declared illegal and liable to be quashed.

5.6 The respondent company has been making profits and has also been paying wages to its workers and salaries to its employees running into crores of rupees. The respondent Company has been making profits regularly and constantly even after paying all workers' dues. Hence there was no justification for exercising powers under the BRU Act. The State Government has refused to disclose the material inspite of specific request made by the petitioners. There is no material on the basis of which the State Government could have reached the satisfaction under section 3 of BRU Act for declaring the respondent company a relief undertaking. The impugned notification, therefore, suffers from non-application of mind and is a case of colourable exercise of so-called powers vested in the State Government for completely extraneous and oblique purposes to benefit the private interest of the respondent Company and therefore the impugned notification is arbitrary and malafide.

SUBMISSIONS ON BEHALF OF RESPONDENTS

6.0 On the other hand, Mr S.N. Shelat, learned Additional Advocate General for the State Government and Mr.B.J.Shelat with Mr.Ashok L.Shah for the respondent Company have made the following submissions:-

6.1 The State Government had given cash subsidy of Rs.15 lacs to the respondent Company. The State Government has also given Sales Tax deferment to the tune of Rs.19.06 crores to the respondent Company. The State had further granted benefit of Sales Tax exemption to the tune of Rs.54.61 crores to another unit of the respondent

Company. In view of such financial assistance given by the State Government to the respondent Company the provisions of the BRU Act are applicable to the respondent Company as the State Government is interested in survival and growth of the respondent Company.

6.2 The Division Bench of this Court has also upheld the constitutional validity of the provisions of the BRU Act in M/s D.S.Patel & Co vs The Gujarat State Textile Corporation Ltd & Ors., (1972) 13 GLR 33. The Division Bench has held that the State Government can exercise the powers under the BRU Act even to grant temporary protection to a relief undertaking against its secured creditors under section 4(1)(a)(iv) of the Act, hence, there is no question of reading the provisions of said sub-clause ejusdem generis with the previous clauses which relate to suspension of provisions of laws pertaining to industrial relations etc.

6.3 The provisions of the DRT Act only provide a remedy and the said Act is not concerned with the rights of the creditors whereas the provisions of the BRU Act empower the State Govt to suspend the substantive rights of the creditors and therefore there is no conflict between the two Acts nor does the DRT Act override the provisions of the BRU Act; they operate in two different fields without overlapping each other.

6.4 The object of the BRU Act is different from the object of the SICA and even if SICA is applicable, the applicability of the BRU Act is not excluded.

6.5 While exercising powers under section 4(1)(a)(iv) the State Government exercises quasi-legislative powers and therefore there is no question of giving opportunity of hearing before exercising such powers. The decision in Goyal M.G. Gases (Supra) deserves to be reconsidered.

6.6 The impugned notification was issued with a view to see that 489 workers who are working with the respondent Company may not lose their job and question of unemployment may not arise. Over and above the said number of workers directly employed by the Company, there are approximately 380 contract workers and they are also likely to lose their job if the respondent Company is not declared as a "relief undertaking".

7.0 The learned counsel for the respondent-Company has made further submissions on facts including the alleged dues of the petitioners.

7.1 The claim made by the petitioners about their outstanding dues and arrears from the petitioners are denied. It is contended that the petitioners have charged excessive interest and penal interest and they have not given due credit for various payments made by the respondent Company. If proper accounts are taken hardly Rs.20 crores would be in arrears as against Rs.30 crores as claimed by the ICICI. As regards the alleged dues of IDBI, the said claim is also denied. As regards the alleged dues of IFCI it is stated that the dues of the IFCI would not be more than Rs.57 lacs and it is not Rs.101 lacs as claimed by the IFCI. As regards borrowings and repayments, the following figures are given by the respondent-Company as stated in their affidavit in reply :-

Petitioner- crditors	Borrowings	Repayment made by Respondent No. 2
	(Rupees in lacs)	
ICICI	Rs.11267 approx.	Rs.11568 approx.
*SCICI	Rs. 575 "	Rs. 116 "
IDBI	Rs. 700 "	Rs. 139 "
IFCI	Rs. 111 "	Rs. 239 "
Total	Rs.12653	Rs.12063

*(Debts to SCICI have merged into the debts to ICICI)

7.2 As regards the claim of the ICICI to appoint their representatives as nominee Directors on the Board of the respondent Company it is submitted that in view of suspension of all rights, privileges, obligations and liabilities, the ICICI can not appoint its representative as Director on the board of the respondent Company.

As regards the requisition of ICICI for conversion of its loan into equity shares of the respondent-Company, it is stated that the first requisition was issued on 15.9.1999 for conversion of Rs.781 lacs into equity shares of the respondent Company, and the respondent Company did, in fact, issue equity shares of Rs.781 lacs to the ICICI on 27.9.1999 and that this material fact has been concealed by the petitioners. However, when the ICICI issued second notice of

conversion on 15.3.2000 claiming conversion of Rs.722 lacs into equity shares of the respondent Company, by that time the respondent Company was already declared as "a relief undertaking" under the BRU Act, and therefore, the rights and privileges of the ICICI or the obligations and liabilities of the respondent Company under the agreements entered into between the parties in the year 1996-97 had already stood suspended. There was no question of respondent Company being required to comply with the conditions of notice dated 15.3.2000. Hence, there was no default or breach of agreement on the part of the respondent Company. The agreement dated 30.12.1997 under which conversion of Rs.500 lacs was claimed did not contain any clause for conversion.

7.3 The petitioners can file suits against the respondent company under the provisions of DRT Act but in view of suspension of all rights of the petitioners under various agreements and notification dated 22.10.1999 under BRU Act the petitioners have no enforceable operative right against the respondent Company and therefore presently it can not invoke provisions of the DRT Act.

7.4 The allegations of conspiracy between the respondents inter se are denied. The powers under BRU Act have been exercised on relevant considerations. The respondent Company is one of the leading companies in the country engaged in manufacturing telecommunication cables and its sole buyer is Government of India through its Department of Telecommunications (DOT). At times, even MTNL also places orders for telecommunication cables with the Company which has a very modern plant for manufacturing PIJF telephone cables. The Company pays Central Excise duty to the extent of Rs.21.55 Crores per annum. The Company is situated in an industrially backward area and the Government of Gujarat is encouraging industries to be established in the said area.

7.5 The Company provides employment to 750 persons consisting of 450 permanent employees and 220 employees through contract and is regularly paying all dues of its employees including provident fund and ESI dues. The annual wage bill of the Company is about Rs.360 lacs.

7.6 The respondent Company is trying its best to pay up its various creditors. The Ahmedabad Electricity Company (AEC) had filed a winding up petition claiming Rs.140 lacs. The matter was settled and pursuant to consent terms the Company has already paid up a total

amount of Rs.100 lacs towards principal and has also paid a substantial part of interest to the AEC. Similarly, the Company has paid dues of its other creditors like M/s P.G.Foils Ltd, M/s Garware Polyester Ltd and M/s Systematic Steels of Bombay. The Company is regularly paying the said creditors without any default even where no winding up petitions are filed.

7.7 The performance of the Company in terms of annual production turnover and profits for the last fou

Financial Year	Production (lac KMs)	Turnover (Rupees in lacs)	Gross Profit (after interest but before taxation) (Rupees in lacs)
1996-97	19.16	16037	720
1997-98	28.42	21170	565
1998-99	30.41	19930	620
1999-2000	22.14	16554	

The respondent Company is going through severe liquidity crunch for reasons beyond its control. Therefore, it has not been able to pay up the dues of the petitioners but the present liquidity crunch is only a temporary phase. The Company's assets are more than its debts and the Company will come over this phase in the near future but if in the meantime the creditors like petitioners are allowed to exercise their rights, the operations of the company would come to a grinding halt resulting into unemployment of hundreds of persons, hence, the State Government has rightly exercised its powers under the BRU Act while issuing the notification dated 22.10.1999. The petitioners are fully secured and have charge/s on various assets of the respondent-Company. The present day value of such properties of the respondent Company are almost about Rs.100 crores, far more than the claim of the petitioners taken together. Hence, the petitioners are not at all adversely affected by the publication of said the

notification.

STATUTORY PROVISIONS AND IMPUGNED NOTIFICATIONS

8. Before dealing with the rival contentions, it is necessary to set out the relevant provisions of the BRU Act and the impugned notifications :-

Preamble to the Bombay Relief Undertakings (Special Provisions) Act, 1958 reads as under:

"An act to make temporary provisions for industrial relations and other matter to enable the State Government to conduct, or to provide loan guarantee or financial assistance for the conduct of, certain industrial undertakings as a measure of preventing unemployment or of unemployment relief.

Whereas it is expedient to make temporary provisions for industrial relations and other matters to enable the State Government to conduct, or to provide loan guarantee or financial assistance for the conduct of certain industrial undertakings as a measure of preventing unemployment or of unemployment relief; It is hereby enacted in the Ninth Years of the Republic of India as follows".

Section 3 of the Act reads as under:

"3. Declaration of relief undertaking: (1) If at any time it appears to the State Government necessary to do so, the State Government may, by notification in the official gazette, declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan guarantee or other financial assistance has been provided by the State Government shall, with effect from the date specified for the purpose in the notification be conducted to serve as a measure of preventing unemployment or of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of this Act.

(2) A notification under subsection (1) shall have effect for such period not exceeding twelve months as may be specified in the notification; but it shall be renewable by like notifications from time to time for further periods not exceeding twelve months at a time, so however that all the periods in the aggregate do not exceed ten years".

Section 4 of the Act reads as under:

"4. Power to prescribe industrial relations and other facilities temporarily for relief undertakings: (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, order or other provisions whatsoever, the State Government may, by notification in the Official Gazette, direct that--

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under subsection (2) of section 3--

(i) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply and such relief undertaking shall be exempt therefrom, or shall, if so directed by the State Government, be applied with such modifications which do not however affect the policy of the said laws, as may be specified in the notification;

(ii) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or any other financial assistance was provided to it by, or with the approval of the State Government for being run as a relief undertaking shall be suspended in operation, or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;

(iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement, thereof shall be suspended and all proceedings relative there to pending before any Court, Tribunal, officer or authority shall be stayed;

(b) the right, privilege, obligation or liability referred to in clause (a) (iv) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued;

Provided that in computing the period of limitation for the enforcement of such right, privilege, obligation or liability the period during which it was suspended under clause (a)(iv) shall be excluded notwithstanding any thing contained in any law for the time being in force.

(2) A notification under subsection (1) shall have effect from such date, not being earlier than the date referred to in subsection 3, as may be specified therein and the provisions of section 21 of the Bombay General Clauses Act, 1904 (Bom I of 1904) shall apply to the power to issue such notification.

SCHEDULE

1. The Industrial Employment (Standing Orders) Act, 1946(XX of 1946)

2. The Industrial Disputes Act, 1947(XIV of 1947)

3. The Bombay Industrial Relations Act, 1946 (XI of 1947)

4. The Bombay Shops and Establishments Act, 1948(Bom.LXXIV of 1948)

5. (* * *)

6. (* * *)

SAURASHTRA ACT

7. The Saurashtra Shops and Establishments Act, 1951 (Sau Act No.X of 1951)

8. (* * *)

The impugned Notification dated 22.10.1999 under sections 3 and 4 of the BRU Act reads as under:

" LABOUR AND EMPLOYMENT DEPARTMENT
NOTIFICATION
SACHIVALAYA, GANDHINAGAR
DATED 22.10.1999

The Bombay Relief Undertakings (Special Provisions) Act, 1958.

No.GHR 99-174-BRU-1099-4341-M(3) In exercise of the powers conferred by Section 3 of Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as the said Act) the Government of Gujarat hereby declares that the Industrial Undertaking, namely, the Gujarat Telephone Cables Ltd, Ahmedabad (referred to as "the said undertaking") shall be conducted to serve as a measure of preventing unemployment with effect from 22.10.1999 and the said undertaking shall accordingly deemed to be a relief undertaking for the purpose of the said Act for a period of 12 months from 22.10.1999 and in exercise of the powers conferred by sub clause (4) of clause (a) of subsection (1) of Section 4 of the said Act, the Government of Gujarat is also pleased to direct that in relation to said undertaking all rights, privileges, obligations, liabilities (other than those liabilities etc towards its employees) occurred or incurred before the said undertaking is declared as a relief undertaking and any remedy for the reinforcement thereof shall suspended and all proceedings relating thereto pending before any Court, Tribunal, Officer or authority shall be stayed during the period for which the said undertaking shall continue to be a relief undertaking namely for the period of twelve

months commencing from the Dt.22.10.1999.

By order and in the name of the Governor
of Gujarat

(Shailaja Patel),
Under Secretary,
Labour and Employment Department"

The impugned Notification dated 6.10.2000 reads as under:

LABOUR AND EMPLOYMENT DEPARTMENT
NOTIFICATION
Sachivalaya, Gandhinagar
Dt. 06/10/2000

THE BOMBAY RELEIF UNDERTAKINGS (SPECIAL PROVISIONS) ACT, 1958

No. GHR-2000-1980brU-200-2832-M(3)WHEREAS, the Gujarat Telephone Cable Ltd. Chharodi Farm, Ta. Sanand, Dist. Ahmedabad (hereinafter referred to as `the Said Undertaking') has applied for extension of its status of Relief Undertaking for a further period of twelve months with reference to the Government Notification Labour and Employment Department NO> GHR-99-174-BRu-1099-4341-M(3), dated : 22nd Octo. 1999.

AND WHEREAS, circumstances exist that render it necessary that said undertaking continue to be so conducted ;

NOW, THEREFORE, in exercise of the Poswers conferred by sub-section (2) of section 3 and also by sub-clause (IV) of clause (a) of the sub-section (1) of section 4 of the Bombay Relief Undertaking (Special Provisions) Act, 1958 (No. XCVI of 1958); the Government of Gujarat hereby:-

(1) Declares the said undertaking to be a relief undertaking for a further period of twelve months with effect from the Dt.22/10/2000 subject to Judgement of Hon. High Court in the SCA No. 6324/2000 and accordingly, the said undertaking shall continue to be conducted to serve as a measure of

preventing Unemployment relief; and

(2) Directs in relation to the said undertaking that all rights, privileges, obligations, liabilities (other than those liabilities etc., towards its employees) accrued or incurred before the said undertaking was declare as a relief undertaking or any remedy for the enforcement thereof shall be suspended and all proceeding srelating thereto pending before any court, tribunal, officer or authority shall be stayed for a period of twelve months with effect from the Dt. 22/10/2000.

By order and in the name of the Governor of Gujarat,

Sd/-
(T.A. Saiyed)
Section Officer
Labour and Employment Department.

DISCUSSION

CONTENTION I : Sec. 3 and Financial Assistance

9. As regards the first contention of the petitioner that the provisions of the BRU Act are not applicable. the argument is that unless the State Government has given its assistance by contributing to share capital or by advancing loans, the State Government can not be said to have given any financial assistance. On the other hand, the respondents have pointed out that apart from the cash subsidy of Rs.15 lacs the State Government has also given financial assistance of substantial amounts by giving Sales Tax deferment benefit to the tune of about Rs.19 crores to the respondent Company and also Sales Tax exemption benefit of about Rs.54 crores to another unit of the respondent Company.

It appears to the Court that apart from cash subsidy the Sales Tax deferment benefit must also be held to be financial assistance as contemplated by Section 3 of the Act because the State Government has postponed recovery of its dues from the respondent Company for a huge amount of Rs.19 crores which otherwise the respondent Company would have been liable to pay immediately upon sale of its products. By granting the exemption of Rs.54 Crores of the Sales Tax, the State

Government has given the respondent Company a positive and direct benefit which can certainly be termed as financial assistance by the State Government. The condition precedent for applying the provisions of BRU Act is therefore satisfied in case of the respondent Company and, therefore, the first contention must be repelled.

CONTENTION II - Is sub-clause (iv) to be read ejusdem generis

10. As regards the contention that the provisions of Section 4(1)(a)(iv) must be construed ejusdem generis and therefore only the rights and privileges of the workers under the Acts pertaining to industrial relations can be suspended and that the rights of the creditors can not be suspended, the same must also be repelled as the matter is no longer res integra. A Division Bench of this Court, while upholding the constitutional validity of the provisions of the BRU Act, has held in M/s D.S.Patel & Co vs The Gujarat State Textile Corporation Ltd, (1972) 13 Guj. Law Reporter 33 that the protection may be granted against creditors also. The Bench observed as under :-

"The Act provides for sufficient guidance and checks on the exercise of the power by the State Government while acting under sec. 4. If in a particular case the Government finds that the industry cannot stand on its legs without getting some temporary relief in the payment of its huge wage bill, then the Government would issue notifications under any of the first three sub-clauses of sec. 11(1)(a). But if the Government finds that the payment of the wage bill is not much of a financial problem for the industry and that it is the protection from its creditors which the industry requires, then instead of taking action under sub-clauses (i), (ii), (iii), the Government may well take action under sub-clause (iv) and suspend all or any of the rights, liabilities and obligations under that clause. Whatever action the Government proposes to take under sec. 4, would obviously be guided by one supreme consideration, namely that of putting the industry on a sound footing so that the apprehended unemployment resulting from the closure of the industry can be avoided."

(emphasis supplied)

In view of the aforesaid clear pronouncement of

the Division Bench of this Court, the second contention also fails.

CONTENTION III - Does DRT Act override BRU Act

11. As regards the contention about the applicability of the provisions of the DRT Act, the Court is of the view that the BRU Act and DRT Act operate in different fields. The BRU Act empowers the State Government to temporarily suspend the rights and privileges of the creditors and the obligations and liabilities of the relief undertaking and so long as the notification under BRU Act remains in force the creditors can not avail of any remedy to enforce their substantive rights. The provisions of DRT Act merely provides for the forum and the procedure for adjudication and recovery, but they do not expand the rights and remedies of public financial institutions and banks nor do they purport to remove the embargo imposed by or under another statute upon the enforcement of the rights of the creditor-institutions. At this stage the Court would like to clear one misconception entertained by the respondents that what Sec. 4(1)(a)(iv) suspends is the substantive rights. In M/s D.S. Patel vs. GSTC, the Division Bench has held that by the said sub-clause the right is not suspended, but only the remedy for enforcement of the right is suspended. The Division Bench explained this aspect in the following words :-

> "A bare reference to sec. 4 shows that the only restriction which it contemplates is that of temporary suspension of the rights and liabilities relating to the relief undertaking in question. The petitioners being the creditors of the undertaking, their right to recover their dues is suspended under sub-clause (iv). Shri Vakil contended before us that since under the said sub-clause (iv) even the substantive right itself is supended, the petitioners will not be entitiled to claim any interest on their outstanding dues for the period during which notification under sec. 3 remains in force. It is undoubtedly true that sub-clause (iv) is so worded that on plain reading it gives an impression that what is suspended is not only the remedy for the enforcement of the right to hold but also the right itself. But we find that on true constructions of this sub-clause the right itself is not suspended, but only the remedy for the enforcement of the right is suspended."

"We find that the legislature has advisedly used the word "suspended" and "stayed" in sub-clause (iv) with reference to rights, remedies and proceedings. "Suspension" is not tantamount to "destruction" or "annihilation". Therefore, when the sub-clause speaks about "suspension" of a right, it only means suspension of its execution or enforccement. The incidents of a right, except its executability, are therefore, not suspended by the sub-clause."

(emphasis supplied)

Hence, the question of the provisions of the DRT Act overriding the provisions of the BRU Act does not arise. They operate in two different fields.

CONTENTION IV - SICA and BRU Act

12. The contention that a sick industrial Company can get temporary protection against the creditors only under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), which is a Central Act and not under any other law, much less under a State law, would have required serious consideration if it was shown that respondent No. 2 Company was covered by the SICA. The provisions of SICA are applicable only to those industries which are specified in the first Schedule to the Industries (Development & Regulation) Act, 1951. There is nothing in the petition to show that the respondent Company is engaged in the manufacture or production of the articles mentioned in the said schedule. Moreover, SICA also stipulates certain conditions upon fulfilment of which alone a Company can be registered as a sick Company under SICA. In absence of the necessary pleadings and material on record, the Court does not accept this contention of the petitioners.

However, the question has been examined in the later part of this judgment while examining the scope and content of hearing required to be given to the creditors and workers.

CONTENTION V - Notice to Creditors and hearing

13. As regards the contention that the notification is vitiated by absence of public notice and hearing, the learned counsel for the parties made detailed submissions. It is true that in Goyal M.G. Gases, 2000 (1) GLH 661, I have held that before exercising powers

under sections 3 and 4 of the BRU Act, the State Government is required to issue a public notice and give an opportunity of hearing to the creditors as they are going to face serious civil consequences upon issuance of notification/s under sections 3 and 4 of the BRU Act. In the said decision I laid down as under :-

" When the declaration under Section 3 of the BRU Act to be followed by a notification under Section 4 of the said Act is going to have serious impact on the civil rights of all the creditors and other persons concerned with the Company and their right/s to recover their legitimate dues are going to be suspended by virtue of notification under Section 4 of the Act, the principles of natural justice must be read into the provisions of Section 3 and Section 4 of the Act. Even if individual notices may not be required to be issued to all the individual creditors, at least a public notice must be issued in two daily newspapers having wide circulation in the State where the registered office of the Company is situate so that all the persons likely to be affected by issuance of the declaration under Section 3 and notification under Section 4 can present their views before the State Government makes such a declaration under Section 3 and issues such a notification under Section 4. Admittedly in the facts and circumstances of the present case, no such public notice was issued. On this ground also, the impugned notification dated 8.12.1988 was vitiated by a serious legal infirmity."

14. However, now Mr S.N. Shelat, learned Additional Advocate General for the State Government and M/s B.J.Shelat and A.L.Shah, learned counsel for the respondent-Company have vehemently submitted that the suspension of rights and privileges or obligations and liabilities under the commercial agreements between the parties amounts to exercise of quasi legislative powers and therefore the duty to give notice and to afford hearing can not be read into the provisions of Sections 3 and 4 of the Act and have prayed for reconsideration of the decision rendered by me in Goyal M.G. Gases vs. State of Gujarat (Supra).

15. Having heard the learned counsel for the parties at length and considering the fact that the contention that Sections 3 and 4 of the Act confer a quasi

legislative power on the State Government was not advanced before me at the hearing of the Goyal M G Gases Ltd. (Supra) and that the decision was rendered only in the context of the argument urged therein that it was exercise of an administrative power, I have heard the learned counsel for the parties and interveners at length on the controversy de novo, deriving comfort and strength from the following wise and inspiring words of Justice Bronson in Pierce vs. Delameter, (1847) 3 AMY 18 :-

> "a judge ought to be wise enough to know that he is fallible, and therefore, ever ready to learn; honest enough to discard all mere pride of opinion and follow truth wherever it may lead; and courageous enough to acknolwedge his errors."

16. Mr S.B. Vakil, learned counsel for the petitioners relied on the decisions of the Apex Court in Hamdard Dawakhana vs. Union of India, AIR 1960 SC 554 in order to show the distinction between the conditional legislation and delegated legislation. He further relied on the decisions of the Apex Court in Swadeshi Cotton Mills vs. Union of India, AIR 1981 SC 818, Union of India vs. Cynamide India Ltd., AIR 1987 SC 1802, State of U.P. vs. Renusagar Power Co., AIR 1988 SC 1737, Vishakhapatna Port Trust vs. Ram Bahadur Thakur Pvt. Ltd., (1997) 4 SCC 582 and State of Tamil Nadu vs. K. Sabanayagam, (1998) 1 SCC 318 = AIR 1998 SC 344. The thrust of Mr Vakil's arguments was that the power to issue declaration under Section 3 and directions under Section 4 of the BRU Act is an administrative power as already held in the aforesaid decision of this Court in Goyal MG Gases (Supra) and that in any view of the matter, in view of the principles laid down by the Apex Court in the aforesaid decisions, such power must be held to be an administrative power because while exercising such power, it is required to be exercised with respect to an individual industrial Company and not with reference to a class of industries. Hence, the application of the industry to get the declaration/directions under Sections 3 and 4 of the BRU Act is required to be examined by the State Government on objective facts. Such assessment cannot be complete without the creditors and employees/workers of the Company getting an opportunity to rebut the material placed by the Company and that the principles of natural justice are, therefore, required to be read into the provisions of the BRU Act. It was submitted that the declaration cannot be issued without giving atleast a public notice about the application of an industrial Company to claim the declaration and directions under the

BRU Act and without all affected parties getting an opportunity of being heard.

17. On the other hand, the submission of the learned counsel for the respondents was that the exercise of powers under the BRU Act involves suspension of rights of the creditors and/or workers and, therefore, it is a legislative power delegated to the State Government and that as per the well settled legal position, for exercising such quasi legislative power, the delegate is not required to give any hearing. Strong reliance has been placed on the decision of the Apex Court in Union of India vs. Cynamide India Ltd., AIR 1987 SC 1802 and particularly on the following observations :-

> "Legislative action, plenary or subordinate, is not subject to rules of natural justice. Where the Parliament itself provides for a notice and for a hearing, the concerned parties would have a right of hearing and substantial non-observation of the procedure may have the effect of invalidating the subordinate legislation. But where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. Even where the legislature directs the subordinate legislating body to make such enquiry as it thinks fit before making the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been.
>
> (emphasis supplied)

Reliance is also placed on the observations in the aforesaid decision to the effect that there may be legislation of particular application only.

18. In Cynamide India Ltd. (Supra), Chinnappa Reddy, J. speaking for the Apex Court referred to the blurring of distinction between legislative and administrative functions as under :-

> "It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration

to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is `difficult in theory and impossible in practice'.

However, since the Courts have to decide actual cases and answer the questions posed before them one way or the other, the difficult exercise of drawing a line has to be undertaken. That is why Chinnappa Reddy, J. continued as under :-

"Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as one between the general and the particular'. `A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; and administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. `Legislative is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.' It has also been said "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the

future."

Cynamide was a case dealing with the dispute about the challenge to the Drugs Price Control Order and the Apex Court held that price fixation was more in the nature of a legislative activity than any other. The Court, however, added as under :-

"Price-fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price spearately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominess and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character. Otherwise, price fixation is generally a legislative activity."

19. Cynamide, however, has not been the last word from the Apex Court on this controversy and more particularly on the duty to give a hearing depending on the nature of the power being exercised by a delegate of the legislature.

In State of Tamil Nadu vs. K. Sabanayagam, (1998) 1 SCC 318 = AIR 1998 SC 344, the Supreme Court explained the distinction between the delegated legislation and conditional legislation and then divided conditional legislation into three categories :-

First category

"when the legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate who being satisfied about the conditions indicating the ripe time for applying the machinery of the said Act to a given area exercises that power as a delegate of the parent legislative body. This

would be an act of pure and simple conditional legislation depending upon the subjective satisfaction of the delegate as to when the Act enacted and completed by the parent legislature is to be made effective.

(The Apex Court held that the principles of natural justice would not apply to this category).

Second category

"where the delegate has to decide whether and under what circumstances a completed Act of the parent legislation which has already come into force is to be partially withdrawn from operation in a given area or in given cases so as to not to be applicable to a given class of persons who are otherwise admittedly governed by the Act. If such satisfaction has to depend upon pure subjective satisfaction of the delegate and not on the prima facie proof of factual data and if such an exercise is to uniformly apply in future to a given common class of persons and not to be confined to individual cases, then also the principles of natural justice are not mandated."

Third category

"where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such a power by the delegate. In such type of cases the satisfaction of the delegate has necessarily to be based on objective consideration of the relevant data for and against the exercise of such power. This exercise is not left to his subjective satisfaction nor is it a mere ministerial exercise. Section 36 of the Payment of Bonus Act falls in this third category of conditional legislative functions. .. .. ..

Implicitly in section 36 is the direction

> to the appropriate Government by the legislature that it should form its opinion on objective facts furnished not only by the establishment or a class of establishments claiming such exemption but also by the employees who are likely to be affected by the exercise of such power and who should necessarily get an opportunity to submit their material in rebuttal. .. .. ..
>
> In such category of cases the delegate exercising power of conditional legislation does not lay down a uniform course of conduct to be followed by the entire class of persons covered by the sweep of such an exercise but lays down a favourable course of conduct for a smaller class of persons at the cost of rival large category of persons covered by the very same exercise of power. To that extent there is a mini lis between these two rival categories of persons. Such exercise may also cover existing situations as well as future situations sought to be subjected to the exemption for the period prescribed in the order and may sometimes affect to any permissible extent even past transactions in individual cases. ..... In such a situation, principles of fair play or consultation or natural justice cannot be totally excluded.... The affected parties must be given at least an opportunity to put forward their rebuttal evidence or material against the material furnished by the claimant-establishment."

20. It is not the case of any party that the exercise of powers under Sections 3 and 4 of the BRU Act could conceivably be classified as a delegated legislation. The controversy is whether it is an administrative power or the power of conditional legislation of the third category.

Some of the learned counsel for the respondents even submitted that the present case would not fall even in the latter category, because the creditors did not have any preexisting rights under the BRU Act which the impunged notifications take away, unlike the right of the workmen to get bonus under the Payment of Bonus Act. Hence, while the Government considering the employer's application for exemption under section 36 of the Payment of Bonus Act will have to give the workmen an opportunity to rebut the material placed by the employer, the said principle cannot be invoked by the creditors when the

State Government is considering the application of a Company for protection under the BRU Act.

21. This contention, however, cannot be accepted for the simple reason that the decision of the Apex Court importing fair play in Section 36 of the Payment of Bonus Act is essentially based on the lis between and the employer and workmen and not on the basis that the right of the respective parties flow from the same enactment. The principle of fair play is imported on the ground that a person or group of persons likely to be adversely affected by the exercise of quasi-legislative power by the State Government on objective assessment of facts placed by and for the benefit of the Company in an individual case, is entitled to be consulted by the Government. It is not possible to appreciate how the rights of creditors under the Indian Contract Act can be considered of no significance when the debtor Company is invoking the protection from the State Government against the creditors under the BRU Act, which may theoratically be extended for a long period of ten years.

22. Before expressing the final view on this controversy, the Court would like to point out that in De Smith, Woolf & Jowell on Judicial Review of Administrative Action (1995) (5th Edution), the chapter of Classification of Functions as "legislative", "administrative", "judicial" has been relegated as an appendix to that book.

In the opening paragraph of that appendix, the following observations are made :-

> "For many years the development of English administrative law was impeded by the distinctions made by the Courts between functions which were classified as "legislative", "administrative", "judicial", "quasi-judicial" and "ministerial". In particular, natural justice was reserved for decision-making which was "judicial" or "quasi-judicial" in nature and judicial review as a whole was not considered appropriate for decisions which were of a "legislative" or "ministerial" character.
>
> In the last edition of this work which he edited (in 1973), de Smith was highly critical of the "terminological contortions" produced by these classifications. Although he thought that the conceptual problems associated with the

> classifications still "appeared to be overwhelming", he regarded them as "analytically erroneous" and detected some hope that "to an increasing extent courts exercising powers of judicial review in administrative law are abandoning servitude to their own concepts and asserting mastery over them.
>
> Servitude to these classifications has now largely been abandoned."

23. Having regard to the scheme of the Act as already examined by a Division Bench of this Court in D.S. Patel case (1972) 13 GLR 33, it is clear that the BRU Act empowers the State Government to suspend the rights of the creditors under contracts and also the rights of the employees to enforce and execute their respective rights under the relevant settlements/standing orders or even industrial legislations. Exercise of such a power partakes the nature of a quasi legislative activity though it may be in an individual case. At the same time, it is not a one time exercise, unlike granting exemption under section 36 of the Payment of Bonues Act.

When the State Government issues directions under sub-clauses (i) to (iii) which affect the employees/workers of the industrial undertaking in question, there would be a mini lis between the Company management on the one hand and the employees/workers on the other hand. Any direction in favour of the industrial Company would be at the cost of the employees/workers who would, therefore, be required to be given an opportunity of hearing. Similarly, any direction under sub-clause (iv) suspending the rights of the creditors and liabilities of the Company would involve decision of a lis between the Company on the one hand and its creditors on the other hand. While the State Government's first decision to issue notification under Section 3 of the Act and issuance of temporary directions under Section 4(1)(a)(i) to (iii) or 4(1)(a)(iv) may initially involve a larger degree of policy discretion, continued and unconditional operation of such notification and directions without any consultation with the affected parties like workers and creditors within reasonable time would make such continuance illegal.

24. Having given my thoughtful and anxious consideration to the issue, I am satisfied that the exercise of powers under the BRU Act partakes the nature of an activity coming close to a quasi legislative

activity of conditional legislation falling in the third category (as explained by the Apex Court in State of Tamil Nadu vs. K. Sabanayagam (Supra)), but at the same time the State Government acting through an appropriate agency will have to evaluate whether discretion is again required to be exercised in favour of the concerned industrial Company depending on the assessment of performance of the Company or whether the benefit granted for a particular period is required to be curtailed if the Company is not prepared to carry out its corresponding obligations as may be imposed by the State Government from time to time.

In view of the above legal position, therefore, the principles of fair play, consultation and natural justice must be held to be applicable to the exercise of powers under Sections 3 and 4 of the BRU Act.

25. The next question is what should be the nature, scope and timing of such fair play, consultation and natural justice. The learned Additional Advocate General initially submitted that it may be left to the State Government to decide in each individual case as to how such fair play, consultation/natural justice may be taken care of. However, looking to the large number of cases in which declarations and directions have been issued by the State Government under Sections 3 and 4 of the BRU Act (as the facts in the case of Goyal MG Gases Ltd. amplify), the State Government in its Labour Department has not been considering whether the real object of issuing such declarations/directions under Sections 3 and 4 of the BRU Act is achieved, namely whether the Company being granted protection makes a bona fide attempt to put itself on a sound footing (so that the apprehended unemployment which may follow upon closure of the industry on account of coercive recovery by the creditors of the Company is avoided). In other words, the State Government is to grant protection to a sick Company under the BRU Act essentially to enable the Company to rehabilitate itself.

26. Considering the object of the BRU Act, and seeking light from the provisions of the SICA, the Court inquired from the learned Additional Advocate General whether the State Government has evolved any scheme for rehabilitation of non-BIFR sick viable industries. The learned Addl. Advocate General has thereupon produced copies of the Government of Gujarat, Industries and Mines Department Resolution dated 13.8.1998 and Resolution dated 17.4.2000 which contain the "Scheme for Rehabilitation of Small Scale and Non-BIFR Sick Viable

Industries". Preamble to the Government Resolution Dated 13.8.1998 reads as under :-

"1.0 Industrial sickness causes unemployment, non-payment of State and Central Government dues, blocking of institutional finance and non-utilization of productive assets. There are various factors that can be identified as being responsible for causing sickness. These can be broadly categorized into internal and external factors. The internal factors include a) technical causes such as obsolete technology and non-availability of skilled labour, b) financial causes such as poor resource management, diversion of funds and deficiency of working capital and other funds, and c) managerial causes such as lack of entrepreneurship, lack of professionalism and marketing problems. The external factors include a) economic causes such as high cost of inputs, uneconomic size of the project, over estimation of demand and high break even point, and b) socio-political causes such as government controls and its fiscal policies such as taxation and non-payment of subsidies and incentives in time, and, lack of physical and social infrastructure.

2.0 Industrial sickness is an inherent part of the process of development. However, concerted efforts are to be initiated by the Govt. and other concerned agencies for timely detection of sickness at its incipient stage. There is need for a body of experts to expeditiously determine the preventive, ameliorative and remedial measures that need to be put into force for the rehabilitation of viable sick industrial units, and, enforce the measures considered appropriate for the rehabilitation. At the same time, it needs to take active measures for expeditious winding up of non-viable sick industrial units.

3.0 To facilitate the revival of viable sick industrial units as also the winding up of non-viable sick units, Government of India have set up a statutory board viz. Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985. Small Scale Industries do not, however, come under the purview of BIFR.

Government of Gujarat had, therefore, introduced a Scheme for rehabilitation of SSI and non-BIFR sick industries vide Government of Gujarat IM&ED Resolution No. SIU-1091/3224-CH dated 20th June, 1991. The Scheme has been in operation for nearly seven years. As the impact of the Scheme in tackling the problem of sickness in the SSI sector was not found satisfactory, the State Government have reviewed the Scheme and decided to modify it suitably for effective rehabilitation of Small Scale and non-BIFR Sick Industries.

4.0 In a meeting with the bankers held on 22nd May 98 by Hon. Chief Minister, the issue of revival and rehabilitation of the SSI units was discussed in detail. The bankers unanimously agreed about the imperative need to initiate protective measures in this direction and assured the State of their total commitment in view the RBI guidelines. Two important decisions that were arrived at in this meeting were :

(a) A State level body would be set up on the lines of BIFR and the bankers agreed to comply with its recommendations regarding financial sacrifices for the rehabilitation of the sick unit.

(b) RBI also expressed its commitment to comply with the recommendations of this state level body for effective revival of non-BIFR viable sick industrial units.

Further, the Hon. Minister, Industries held a series of consultative meetings with the members of trade and industry and experts in the field to understand the reasons for sickness and policy that needs to be adopted for addressing these concerned. Accordingly, the State Government has decided to approve the following Scheme in supersession of IM&ED Resolution No. SIU-1091/3224-CH dated 20th June, 1991."

27. As held by a Division Bench of this Court in D.S. Patel' case 13 GLR 33, the supreme consideration which must guide the State Government while exercising powers under Sections 3 and 4 would be that of putting the particular industrial unit on a sound footing so that the apprehended unemployment resulting from the closure of the industry can be avoided. Now, this exercise of

putting the industry on a sound footing will obviously involve examination by an body of experts of various facets including past performance, present situation and future prospects of the Company. The State of Gujarat having already established such a body of experts (GBIFR) for approving and implementing the scheme for rehabilitation of small scale and non-BIFR sick viable industries would, therefore, be the best body to examine all the relevant aspects before the State Government exercises its powers under Section 3 and 4 of the BRU Act or even during the period when the notifications under the BRU Act are in operation.

Hence, while directing that the State Government shall have recourse to fairplay, consultation and natural justice while exercising powers under the BRU Act, the Court will direct that the scheme for rehabilitation contained in the Government Resolution dated 13.8.1998 as amended from time to time shall be applied by the State Government while exercising the powers under Sections 3 and 4 of the BRU Act.

28. As far as the issuance of declaration under Section 3 of the BRU Act is concerned, it is obvious that the declaration by itself is not going to hurt the workers or the creditors and, therefore, issuance of such a declaration need not presuppose the issuance of public notice inviting objections from the workers or creditors of the Company but the power to issue directions under Section 4 of the BRU Act is bound to seriously and adversely affect the particular class of persons -workers in case of direction under sub-clauses (i) to (iii) of Section 4(1)(a) and creditors in case of notification under sub-clause (iv) of Section 4(1)(a). The question is whether the Government is bound to give a prior hearing to the workers or creditors before issuing directions under Section 4 of the Act.

29. Since, as already indicated above, the exercise of powers under the BRU Act is to be guided by one supreme consideration that of putting the industrial company on a sound footing so that the apprehended unemployment which may follow upon closure of the industry can be avoided, such powers can be exercised only by a body of experts which will have to consider the case of the Company as well as the claims of a large number of creditors and/or workers. Hence, it may not always be possible for the State Government to issue a public notice inviting objections from all concerned before exercising the powers under sections 3 and 4 of the BRU Act. In a given case, the situation may turn out

to be irreversible if secured creditors enforce their security and take over possession or get a receiver appointed after issuance of public notice and before the State Government takes the decision whether to exercise the powers under the BRU Act. The Court, therefore, does not hold that the requirement of pre-decisional hearing is ncessarily imported into the provisions of the BRU Act. However the process of fair play, consultation and natural justice must begin as expeditiously as possible, and in any case within two months. Since the State Government has to act rationally and reasonably while exercising any statutory power, it follows that the State Government shall have to obtain a report of the GBIFR before taking any further decision. Consistent with the above principle, it will have to be directed that before the GBIFR makes any recommendation for extending or curtailing the period of operation of the notification under Section 3 and directions under Section 4 of the BRU Act or for refusing the grant of such extention, the GBIFR shall give an opportunity of hearing to the secured creditors, representatives of unsecured creditors and representatives of workmen, employees and officers of the Company.

30. Since the sick industrial Company is likely to have a large number of secured and unsecured creditors as well as a large number of workers, it would not be necessary for the GBIFR to issue individual notice to all parties likely to be affected, but the GBIFR shall have to issue a public notice in atleast two widely circulated newspapers in the State informing the public at large about the receipt of the application of a Company for obtaining relief under the BRU Act and fixing the first date of hearing before the GBIFR. It would, of course, be necessary for the GBIFR to issue individual notices to the secured creditors whose names shall be supplied by respondent No. 2- Company and also separate notices to the representative unions of workers/employees.

It is clarified that issuance of notices to the representative unions of workers/employees would be required even if the Government does not propose to issue any direction under sub-clauses (i) to (iii) of Section 4(1)(a) of the BRU Act and proposes to issue directions only under sub-clauses (iv) thereof, the reason being that the workers are bound to be ultimately affected one way or the other upon implementation of any scheme of rehabilitation which may be approved by the GBIFR for putting the unit on a sound footing. In a given case, the scheme may involve reduction of the work force. In case a rehabilitation scheme is not approved or an

approved scheme fails in implementation, the ultimate closure of the unit is bound to result into unemployment.

31. It is also clarified that if the GBIFR finds that the Company had not submitted true and correct facts in material respects while making application to the State Government under the BRU Act, it will be open to the GBIFR to recommend to the Stte Government to recall notification issued earlier on the basis of such application.

Can GBIFR and BIFR act in the same field for the same Company ?

32. At this stage, it is necessary to consider whether the BRU ACt and SICA operate in the same field, because there are instances where the same Company has invoked the provisions of both the Acts.

It is obvious that the underlying object of the rehabilitation scheme contained in the State Government resolution dated 13.8.1998 is the same as the object underlying the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The statement of objects and reasons of SICA, inter alia, state as under:-

"The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the Society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilize the productive industrial assets; afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industries companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industries companies through liquidation of those companies.

2. It has been the experience that the existing institutional arrangements and procedure for revival and rehabilitation of potentially viable sick industries companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of a co-ordinate approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely detection of sickness in industrial companies and for expeditious determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch."

(emphasis supplied)

Industrial Companies which satisfy the definitions contained in Section 3(f) ("industrial undertakings") and Section 3(o) ("sick industrial company") of SICA would necessarily have to approach the BIFR and they cannot invoke the provisions of the BRU Act in view of the following provisions of Section 32(1) of the SICA Act :-

"32. Effect of the Act on the other laws.- (1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976 for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instruments having effect by virtue of any law other than this Act."

In view of the fact that the SICA is a Central Act falling under Entry 52 in List I in the 7th Schedule to the Constitution and also in view of the provisions of Section 32 SICA Act, the BRU Act will have to yield to the SICA Act, but where the SICA Act is not applicable because the Company does not fulfill the definitions of "industrial undertaking" as well as "sick industrial Company" as contained in the SICA Act, it is open to such a Company (i.e. non-SICA company) to approach the State

Government for invoking the powers under the BRU Act.

If both the SICA Act and BRU Act are permitted to be invoked by the same Company, there would be multiplicity of laws and agencies making the adoption of a co-ordinate approach for dealing with sick industrial companies impossible.

CONTENTION VI - Whether the impunged notifications are arbitrary and/or mala fide.

33. Having gone though the pleadings of the parties and having heard the learned counsel for the parties, it is obvious that while the challenge to the notification dated 22.10.1999 has become infructuous by efflux of time, the Court does find that the Government has taken into account only the need to prevent unemployment without bothering to consider whether the Company has taken the necessary steps to put itself on a sound footing after issuance of the original notification dated 22.10.1999. In this view of the matter and for failure to give an opportunity of hearing to the secured creditors and representatives of unsecured creditors, the notification dated 6.10.2000 would have been liable to be struck down. But considering that the Court has only now enunciated the revised principles for hearing to be afforded to the affected parties, the Court does not strike down the notification dated 6.10.2000, but issues apporpriate directions in light of the principles laid down in this judgment so that the GBIFR considers the case. The Court also directs respondent No. 2 Company to pay the GBIFR a sum of Rs.1 lac to meet with the administrative consts including costs of public advertisements. It is also clarified that when the State Government receives any application for protection under the BRU Act, once the Government is satisfied about fulfilment of condition precedent regarding financial assistance from the State Government to the applicant, the State Government shall then refer the application to the GBIFR and thereupon the GBIFR shall examine the case of the respondent Company and other Companies applying for protection under the BRU Act even if such cases may not strictly fall within the criteria stipulated in the Government Resolution dated 13.8.1998 as amended from time to time.

DIRECTIONS

34. In view of the above discussion, the following order is passed :-

While the challenge to the Government Notification dated 22.10.1999 at Annexure "C" to the petition has become infructuous by efflux of time, the further operation of the Government Notification dated 6.10.2000 extending the declaration that Gujarat Telephone Cables Ltd. (the Company) is a Relief Undertaking for a further period of 12 months with effect from 22.10.2000 and the direction contained in clause (2) of the said Notification shall continue only upon compliance with the following directions :-

I Within two months from today, the Company shall make an application to the State Government for consideration by the Gujarat Board for Industrial and Financial Reconstruction (GBIFR)-

(i) with a proposed rehabilitation scheme that envisages repayment of loans and interest to the petitioners as well as other creditors of the Company and also repayment of dues, if any, of the State Government/GEB and all other authorities.

(ii) accompanied by the audited accounts of the Company for the preceding two years with the necessary explanation for the auditor's remarks, if any, accompanying the accounts.

(iii) accompanied by a demand draft/pay order for an amount of Rs.1,00,000/- (Rupees One lac only) in favour of the Gujarat Board for Industrial & Financial Reconstruction for meeting with the administrative costs of the GBIFR including the costs of publication of notices in widely circulated newspapers.

II (a) The GBIFR shall consider the application of the Company within four months from the date of receipt of such application after giving public notice in at least two widely circulated daily newspapers in the State and after giving an opportunity of hearing to the petitioners and other creditors of the Company and also the representatives of the employees and officers of the Company.

(b) The GBIFR shall be guided by one supreme consideration - that of putting the

Company on a sound footing.

(c) It will be open to the GBIFR to recommend to the State Government and to all other concerned authorities and creditors to grant appropriate reliefs and concessions as are contained in the Government of Gujarat, Industries and Mines Department Resolution No. SIU-1098-668-CH dated 13.8.1998 and such other and further reliefs and concessions as may be required to be granted to the Company.

(d) The scheme as approved by the GBIFR shall thereafter be implemented in accordance with the provisions of the aforesaid Government Resolution dated 13.8.1998 and subject to such other and further modifications as may be made by the GBIFR.

(e) Subject to the principles laid down in paras 28 to 31 hereinabove, the GBIFR shall follow such procedure as it may deem fit, for considering, monitoring and reviewing the rehabilitation scheme from time to time and in any case the GBIFR shall monitor and review the scheme till continuance of operation of the notification/s under the BRU Act.

(f) During the stages of preparation, consideration and/or implementation of the scheme as aforesaid, the GBIFR shall also consider whether the creditors of the Company may be permitted to file suits or other proceedings before the appropriate forum for adjudication/quantification of the dues of the concerned creditors subject to any condition which the GBIFR may, in its discretion, impose against execution of the decree, award or order which may be passed by the appropriate forum in such proceedings.

(g) During the period as aforesaid, the GBIFR may also consider whether the Company may be required to pay dues of secured and/or unsecured creditors or some or any of them or upto a particular amount or

percentage of dues looking to the amount/s involved and/or for such reasons as the GBIFR may consider just and proper which shall be recorded in writing.

(f) It will be open to the GBIFR, after giving the affected parties an opportunity of hearing, to come to a conclusion that the company in question is not a viable sick unit.

III (i) The GBIFR shall submit report/s to the State Government at least once in every six months from the date of receiving the application of the Company, reporting about progress of the rehabilitation scheme and recommending whether to extend or curtail the period of operation of the notification/s under Sections 3 and 4 of the BRU Act.

Provided that the GBIFR shall not make any recommedation for granting or refusing such extention without giving an opportunity of hearing to the Company and to the secured creditors, a representative of unsecured creditors and the representatives of workes, employees and officers of the Company.

(ii) It is hereby directed that the State Government shall not hereafter renew the declaration under Section 3 or directions under Section 4 of the BRU Act in respect of the Company without considering the report of the GBIFR to be submitted to the State Government as per the aforesaid direction. If the State Government does

reasons for not accepting the report shall be recorded in writing.

IV If the Company does not make an application as per direction I(i) hereinabove within two months from today, the respondents shall be restrained from acting upon or pursuant to the notification dated 6.10.2000 in favour of the Company and the said notification shall cease to have any effect

whatsoever upon expiry of the said time limit.

35. The petition is accordingly disposed of in terms of the aforesaid directions. Subject to the aforesaid directions, Rule is discharged. There shall be no order as to costs.

Ad-interim relief granted earlier on 20.10.2000 stands vacated.

(M.S. Shah, J.)